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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 291.

THE UNITED STATES, Petitioner,

vs.

**THE S. S. WHITE DENTAL MANUFACTURING
COMPANY OF PENNSYLVANIA.**

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS,

BRIEF FOR RESPONDENT.

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COMPANY OF PENNSYLVANIA.

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BRIEF FOR RESPONDENT.

Counter Statement of Question Involved.

Did the respondent sustain a deductible loss from its gross income during the year 1918 under the provisions of the Revenue Act of 1918 by reason of the sequestration of its property by the German Government?

Statement.

The Court of Claims on November 9, 1925, entered its judgment in favor of respondent in the amount of \$83,813.59 with interest thereon at the rate of six per cent per annum from November 14, 1923, to the date of the judgment (Rec. p. 69). The sole question for determination by the court in this case is whether any error of law has been made by the Court of Claims in granting judgment to the respondent, as this Court is bound by the findings of fact made by the Court of Claims.

The Court of Claims found that under date of May 15, 1924, the Commissioner of Internal Revenue rejected the refund claim of respondent, filed under date of November 24, 1923, for the recovery of the sum of \$83,813.59, paid as taxes by it under protest (Rec. pp. 57, 58).

The respondent's refund claim, rejected by the Commissioner of Internal Revenue, is that the assessment made by the Commissioner and paid by respondent under protest—

“is based upon an erroneous and illegal assessment, as said assessment is based upon Committee on Appeals and Review Recommendation No. 3075 of the United States Internal Revenue Bureau that losses of this corporation in 1918 amounting to \$130,764.34 by reason of sequestration of its property ‘The S. S. White Dental Manufacturing Company, m. b. h. of Berlin, Germany,’ by the Imperial German Government

be disallowed. This taxpayer contends that it should not have been required to pay said assessment based on said losses as set forth in Bureau of Internal Revenue's letter of September 5, 1923, signed by J. G. Bright, Deputy Commissioner, initialed IT:CA:M-2.

CEO-2114-4 A pp. This taxpayer insists that it has shown to the Bureau of Internal Revenue its loss in 1918 under subsection 4 of Section 234 of the Revenue Act of 1918 and therefore the amount of \$83,813.59 is refundable to it." (Rec. pp. 57, 58.)

Respondent filed its suit in the Court of Claims on July 24, 1924 (Rec. p. 3), a short time after the rejection of its refund claim under date of May 15, 1924 (Rec. p. 58).

It is shown by the findings of fact that respondent made an original and amended income and profits-tax return for 1918 to the Commissioner of Internal Revenue in which it deducted in its said amended income and profits-tax return the sum of \$130,764.34 for the year 1918, being the value of all the assets of The S. S. White Dental Manufacturing Company, m. b. h. of Berlin, Germany, which were shown on the books of The S. S. White Dental Manufacturing Company of Pennsylvania in 1918, which is known as respondent's Berlin loss, for the reason that on March 19, 1918, the German sequestrator seized and sequestrated the property of The S. S. White Dental Manufacturing Company, m. b. h. of Berlin, Germany, which consisted of fixtures, cash, book accounts, merchandise

stock, and accounts due and owing the said Company (Rec. pp. 50, 51).

Respondent, The S. S. White Dental Manufacturing Company of Pennsylvania, was the sole owner of The S. S. White Dental Manufacturing Company, m. b. h. of Berlin, Germany, at the date of sequestration by the Imperial German Government of The S. S. White Dental Manufacturing Company, m. b. h. of Berlin, Germany, and at said date of sequestration the amount of the investment of The S. S. White Dental Manufacturing Company of Pennsylvania, as shown by its books, was \$130,764.34 in The S. S. White Dental Manufacturing Company, m. b. h. of Berlin, Germany. On account of said sequestration of its company, The S. S. White Dental Manufacturing Company, m. b. h. of Berlin, Germany, the parent corporation, The S. S. White Dental Manufacturing Company of Pennsylvania, charged off its books in the year 1918 the sum of \$130,764.34 appearing on its books as a loss.

The order of sequestration of the German Sequesterator is clear, positive, and sweeping in character and is a very complete document of sequestration and leaves nothing for conjecture. It is:

“Meyers & Co.

Import-Export Commission.

Telephone: Centrum 5110.

Cable Address: Meyers Comp. Wilhelmstr. 42b.
ABC code, 5th edition, used.

Berlin W. 66. Mar. 19, 1918. Wilhelmstr. 42B.

Mr. HERMAN UBERT,

Berlin-Scheneberg, Sponholzstr. 1:

“Hereby I wish to inform you and request you to take note of it that I have been appointed by the Minister of Commerce and Manufacturers as Sequestrator of the concern The S. S. White Dental Manufacturing Company, m. b. h.

“At the same time I wish to inform you hereby that from this day on further purchases in any articles are not allowed any longer and deliveries and sales are to be made from the stock on hand. Orders for which no goods are on hand must remain unfilled. The other business transactions shall be continued until further in the same manner as heretofore. About the business in general I wish to be advised every two days, about special matters at once.

“As to the incoming money and the depositing of same with the bank, all necessary signatures must be given by me. Eventually I will give you power of attorney to receive money. The bank has also been advised of the above.

“Yours truly,

(Signed) “EMIL MEYERS,

“*In the Firm of Meyers & Co.*”

Under the above order of sequestration the property seized and sequestrated by the sequestrator consisted of fixtures, cash, book accounts, merchandise stock, and accounts due and owing the said company (Rec. pp. 50, 51).

The Court of Claims also found that :

“The Berlin store is operated by a German corporation formed expressly for such purpose and owned entirely by the taxpayer.”

and

“The Berlin business was practically suspended during the years 1917 and 1918 on account of the war, and the seizure of the property by the German Government, as heretofore stated.”

The Court of Claims further found that :

“On March 19, 1918, the sequestrator appointed by the German Government took over the taxpayer's property and investment in its branch in Berlin. (Copy of the sequestrator's letter is attached.) This sequestration apparently corresponds to the taking over of the property of enemy aliens in the U. S. by the Alien Property Custodian.

“The investment in the Berlin branch at Dec. 31, 1915, at which time the last authentic report was received, stood as follows :

General investment	\$108,718.08
Capital stock	15,000.00
Furn. & fix	\$7,829.16
Less rept. depr	782.90
	<hr/>
	7,046.26
Total	<hr/>
	\$130,764.34”

(Rec. pp. 53, 54.)

Reserves were set up by respondent under date of July 29, 1918, as shown in the findings of the Court of Claims as follows:

“The S. S. White Dental Mfg. Co.

(Extracts from Minutes.)

Stated Meeting, Board of Directors, November 25, 1918. The S. S. White Dental Mfg. Co., m. b. h.

“The president reported he had referred to our counsel the matter of filing claim with the proper department of our Government for the repayment to us of our loss in connection with this property arising out of its confiscation by the German Government.

* * * * *

“The S. S. White Dental Mfg. Co.

(Extracts from Minutes.)

Stated Meeting, Board of Directors, July 29, 1918. The S. S. White Dental Mfg. Co., m. b. h. Berlin.

“Whereas The S. S. White Dental Mfg. Co., m. b. h., Berlin, represents the following investments in this company's assets as of December 31, 1917:

A-19, capital stock.....	\$15,000.00
B-28, furniture & fixtures.....	7,046.26
B-17, open accounts.....	\$127,670.75
Less formerly ad-	
justed	18,952.67
	<hr/> 108,718.08
	<hr/> 130,764.34”

and

“Whereas in 1916 there was charged as a reserve against this amount the sum of \$20,000; and

“Whereas under continued condition of war the loss will, in the judgment of this board, soon be complete:

“Resolved, That additional reserves be set up on the following basis, viz, \$15,000 quarterly, beginning March, 1918, until liquidated.”

(Rec. pp. 54, 55.)

The Court of Claims in an unanimous opinion said in part:

“As there is no controversy with respect to the correctness of the amount of tax assessed and collected, the only question for determination is whether or not the plaintiff suffered a deductible loss during the calendar year 1918 within the meaning of the statute above quoted.

“It must be admitted that the effect of the action of the German Government was to cause the plaintiff to lose control of and title to the property in March, 1918; it followed that the property was lost to the plaintiff, and there was no means open to it by which it could or did regain control of or title to the property during the year 1918.”

* * * * *

“Losses, which are deductible, it is said, ‘must be evidenced by closed and completed transactions.’ Certainly this transaction was closed and completed in 1918; it remains completed so far as the loss of the plaintiff is concerned.

That is surely complete and has continued to be complete from that time to this. In the construction of statutes common sense must at times be applied, and the facts in this case lead to but one conclusion, which is that the plaintiff suffered such a loss as the statute contemplated when losses were made deductible by its terms.”
(Rec. pp. 67, 68.)

ARGUMENT.

Question for Determination.

Did the respondent sustain a deductible loss from its gross income during the year 1918 under the provisions of the Revenue Act of 1918—by reason of the sequestration of its property by the German Government?

Findings of Fact in Nature of Special Verdict.

This Court has repeatedly held that the findings of fact made by the Court of Claims are to be treated like the verdict of a jury. Mr. Justice Pitney, in the case of *Brothers vs. United States*, in 250 U. S. 88, said:

“For the purposes of our review the findings of that court are to be treated like the verdict of a jury, and we are not at liberty to refer to the evidence, any more than to the opinion, for the purpose of eking out, controlling, or modifying their scope. *United States v. Smith*, 94 U. S. 214, 218, 24 L. ed. 115; *Stone v. United States*, 164 U. S. 380, 382, 41 L. ed. 477, 478, 17 Sup. Ct. Rep. 71; *District of Columbia v. Barnes*, 197 U.

S. 146, 150, 49 L. ed. 699, 700, 25 Sup. Ct. Rep. 401; Crocker v. United States, 240 U. S. 74, 78, 60 L. ed. 533, 536, 36 Sup. Ct. Rep. 245, and cases cited."

It will, therefore, be seen that the findings of fact made by the Court of Claims are binding upon the parties.

Petitioner's Alleged Specification of Error.

The Specification of Error in the brief filed by the United States (Petitioner's Brief, p. 9) limits the question before the court to an assertion that the loss caused by the sequestration was not sustained by the respondent in the year 1918 and was not of its entire investment. It by implication admits that the sequestration is a taking of the entire property of the respondent, and that it did result in a loss.

The facts as found by the Court of Claims show that the loss did occur in 1918 and that it was of the entire investment of the respondent. The Court of Claims said:

"The plaintiff's property was sequestered in 1918; the loss suffered thereby was charged off the books of the plaintiff as a loss in 1918; the plaintiff deducted its loss in its income and excess profits tax return for 1918, the year in which it was sustained."

* * * * *

"It must be admitted that the effect of the action of the German Government was to cause the plaintiff to lose control of and title to the

property in March, 1918; it followed that the property was lost to the plaintiff, and there was no means open to it by which it could or did regain control of or title to the property during the year 1918." (Record, pp. 67, 68.)

In spite of the aforesaid it is argued on behalf of the petitioner that:

"The sequestration by Germany in 1918 of private property of American citizens found within her borders, if operating to divest the owner of title, left him with a claim for its return or for payment, recognized by established international practice, and before the end of 1918 the defeat of Germany made it reasonably certain that the claim had substantial value. The loss, if any, resulting from the sequestration was not ascertained in 1918, because the amount ultimately to be recovered was not known and the transaction was not completed." (Petitioner's brief, pp. 9, 10.)

The Court of Claims, in its opinion, answers the foregoing.

"The plaintiff was the sole owner of The S. S. White Dental Manufacturing Co., m. b. h., of Berlin, Germany, at the date of the sequestration by the Imperial German Government of the property aforesaid, and at said date the amount of the investment of the plaintiff in its German property, as shown by its books, was \$130,764.34. On account of this sequestration of its property the plaintiff charged off its books in the year 1918 the said sum of \$130,764.34, which sum appeared on its books as a loss. The effect of the seques-

tration of plaintiff's property was to destroy and to cause a loss to the plaintiff, which was absolute in 1918."

* * * * *

"The loss sustained by the plaintiff was in our opinion a loss deductible during the calendar year 1918 within the meaning of the statute. Because the plaintiff has a claim which may or may not be paid does not alter the fact that it suffered this loss in the year 1918 and has continued to suffer it down to the present time. The Government cannot continue indefinitely to hold its taxpayers to account upon the idea that something may happen in the future which will change existing conditions" (Record, pp. 66, 68).

The Question of the Re-enactment of Statute.

The petitioner contends that "A deductible loss is sustained only when the loss is realized as the result of a closed and completed transaction." The petitioner has set up Section 234, paragraph 4, of the Revenue Act of 1918 regarding losses and Articles 141 and 144 of Treasury Regulations 45. Suffice to say, that respondent has fully complied with subsection 4 of Section 234 of the 1918 Revenue Act and deducted its loss sustained by it in 1918, as it was not compensated for by insurance or otherwise in 1918, and it also charged its loss off its books in 1918. This court needs no light upon the question of construing internal revenue statutes, and especially with reference to the construction to be given subsection 4 of Section 234 of the 1918 law; there should be no difficulty in arriving at the intent of

Congress, as the language of the statute is plain and there is no ambiguity in it. Particular construction which never came to the attention of Congress in the re-enactment of statutes containing the same language is of no significance.

The petitioner contends that:

"It is submitted that it is the established law that under the Internal Revenue Acts a deductible loss is sustained only when the loss is realized by the transaction being closed and completed." (Record, p. 33.)

The Court of Claims said in its opinion, based upon its findings of fact, which findings are based upon a stipulation of the facts between the petitioner and respondent (Record, p. 49), that in the instant case:

"The loss was complete for the year 1918; it could be and was determined; the transaction for that year was closed and completed. The loss has continued down to the present time with the exception of \$6,000 salvaged from the property in 1921." (Record, p. 68.)

The Supreme Court of Hawaii in 14th Hawaii, 402, Hawaiian Commercial and Sugar Company, Limited, *vs.* Tax Assessor and Collector, in interpreting a statute similar in part to subsection 4 of Section 234 of the 1918 Revenue Law, being Section 4 of the Hawaii territory income tax law, which reads in part as follows:

"The net profits or income of all corporations shall include the amounts paid or payable to, or distributed or distributable among shareholders

from any fund or account, or carried to the account of any fund or used for construction, enlargement of plants, or any other expenditure or investment paid from the net annual profits made or acquired by said corporation. In computing incomes, the necessary expenses actually incurred in carrying on any business, trade, profession or occupation or in managing any property, shall be deducted, and also all interest paid by such corporation on existing indebtedness. * * * Also all losses actually sustained during the year incurred in trade or arising from losses by fire not covered by insurance, or losses otherwise actually incurred; Provided, that no deduction shall be made for any amount paid for new buildings, permanent improvements or betterments made to increase the value of any property or estate."

The court defined a loss under said statute as follows:

"The word 'loss,' and its plural, 'losses,' used in the statute, is not a technical term of art or trade, but a simple word in common use. There is nothing to indicate that those words are used in the statute to express any other than their ordinary meaning. The dictionary definition of the word 'loss' is:

"'Failure to hold, keep, or preserve what one has had in possession; deprivation of that which one has had; as the loss of money by gaming; loss of health; of reputation; loss of children; opposed to gain.' *Crut. Dict.*

"The central idea in each of these definitions is involuntary parting with a thing. If property

is lost it has passed from the control and out of the possession of the loser. No one can lose property and still have it in his possession and be conscious of the fact that he has it."

Respondent Had a Loss in 1918.

Petitioner in its brief states:

"The Court of Claims treated the entire book value of the original investment in the German company, amounting to \$130,764.34, as a loss sustained in 1918 upon, and as the immediate result of, the sequestration in that year."

(Brief, p. 15.)

The petitioner should also have stated that the Court of Claims found that:

"The property seized and sequestered by the sequestrator consisted of fixtures, cash, book accounts, merchandise stock, and accounts due and owing the said company. Because of the aforesaid sequestration of property, which belonged to The S. S. White Dental Manufacturing Co., M. b. h., of Berlin, Germany, the amount of \$130,764.34 was charged off the books of the parent corporation, The S. S. White Dental Manufacturing Co. of Pennsylvania, in the year 1918, as that was the exact amount of the parent corporation's investment in The S. S. White Dental Manufacturing Co., M. b. h., of Berlin, Germany, as shown by the books of the said The S. S. White Dental Manufacturing Co. of Pennsylvania in 1918."

(Record, p. 51.)

And it also found that:

“From the beginning all transactions between the German company and the parent corporation were in dollars. All prices were quoted in dollars and all financial reports from the German company to the parent corporation were made in dollars, and the statements of values, earnings, and losses are all stated in dollars in the claim presented by the company.”

(Record, p. 62.)

The petitioner contends that:

“It is clear that the German Government had a right, if it chose to exercise it, to seize, and even to confiscate, the private property of alien enemies found within its borders on the outbreak of war.”

(Brief, p. 16.)

From the aforesaid, it follows that the petitioner concedes that the German Government had the right to sequester respondent's property on March 19, 1918, which it did as shown by the record (Record, pp. 50, 51).

It may here be stated that Webster's New International Dictionary, 1923 edition, at page 1924, defines “sequester” under international law “to confiscate or seize and appropriate under the right of pre-emption.”

It will thus be seen that to “sequester” property in international law is to confiscate it, and this is also stated by the Standard Dictionary, 1923 edition, page 2231.

In addition to the above, Webster's New International Dictionary, 1923 edition, page 470, also defines "confiscate":

"Seized and appropriated by the government to public use; forfeited."

* * * * *

"To seize as forfeited to the public treasury; to appropriate to the public use."

The petitioner says:

"The Dental Supply Company, on sequestration, was left with a claim against the German Government which it had every reason to believe would be recognized at the end of the war if Germany was defeated."

(Brief, pp. 16, 17.)

From this language used by the petitioner it is quite clear that the fact that respondent had a loss in 1918 under the taxing statute is recognized by the petitioner, and it is difficult to see why a loss thus recognized should not have been deducted by the respondent in its 1918 income and profits tax return, as the Court of Claims has found that respondent was entitled to do.

According to the petitioner:

"The prospects of complete recovery were not so bright if Germany won the war. The real question in this case, therefore, is whether a sequestration under these conditions, with

a definite expectation and prospect under accepted international practice of having the property or its value returned after the close of hostilities, produced a loss sustained by a completed and closed transaction at the time of the sequestration.” (Brief, p. 17.)

The Court of Claims answered the above contention in a complete manner as follows:

“Losses, which are deductible, it is said, ‘must be evidenced by closed and completed transactions.’ Certainly this transaction was closed and completed in 1918; it remains completed so far as the loss of the plaintiff is concerned. That is surely complete and has continued to be complete from that time to this. In the construction of statutes common sense must at times be applied, and the facts in this case lead to but one conclusion, which is that the plaintiff suffered such a loss as the statute contemplated when losses were made deductible by its terms.” (Record, p. 68.)

Continuing, the petitioner states:

“When the property was sequestered in 1918, assuming that the title was divested, the respondent held and owned in place of the property itself a valuable claim against the German Government for the recovery of the property or its value.” (Brief, p. 17.)

The Board of Tax Appeals in Appeal of Remington Typewriter Company, Docket No. 2788, decided September 22, 1926, 4 B. T. A. 880, answers completely the above contention of petitioner for it held:

“Because the petitioner now has a claim which may or may not be paid, does not alter the fact that it suffered a loss in the year 1918. Petitioner should not be indefinitely held to account upon the idea that something may happen in the future, which will change the existing conditions.”

And it also held:

“The loss sustained by the petitioner was a deductible loss during the year 1918, within the meaning of the statute and comes within the rule laid down by the court in *White Dental Mfg. Co. v. United States*, Ct. Cl. —, decided November 9, 1925.”

See also *Emil Stern and Jules Stern*, 5 B. T. A. 89.

The petitioner makes the following assumption:

“Certainly, since November 11, 1918, there has been no reasonable doubt that this claim would be recognized under the rules of international law, and it has been in fact recognized. That the award of the Mixed Claims Commission was only \$70,000 indicates that the Commission was of the opinion that a substantial part of the shrinkage in value of the German assets occurred long before the act of sequestration in March, 1918. The respondent itself thought so, as the record shows it charged off \$20,000 in 1916.” (Brief, p. 17.)

No such assumption can be shown in the record of this case, but on the other hand the petitioner conceded in a stipulation of facts as found by the Court of

Claims that the exact amount of respondent's investment was \$130,764.34. (Record, p. 51.)

Petitioner says:

“The position of the United States is that the sequestration did not leave the respondent with nothing. The prospect of return or payment was definite and substantial, and the loss, if any, to result from the sequestration could not be ascertained until the outcome of the claim for return or payment. Certainly if the German corporation was by the act of sequestration completely divested of title and ownership of the property sequestered there was substituted a claim or demand of substantial value. *Although the prospect of realizing on that claim may have been dubious in March, 1918, by the end of the tax year December 31, 1918, it was evident that if Germany was financially able to, she would pay. If the value of that claim could have been definitely known in 1918, the loss, if any, might have been then definitely ascertained, but until the amount to be realized from the claim was settled the loss was not ascertained.*”

(Brief, p. 18.) (Italics ours.)

In the above mere assumption is resorted to as to what the actual facts were in 1918 as disclosed by the record. The respondent had a definite and positive loss in 1918 of \$130,764.34 (Record, p. 51) and it sustained said loss in the year 1918.

We submit that the petitioner concedes that respondent had a loss in 1918 in the concluding paragraph of the brief filed on behalf of the petitioner as follows:

“While there is something to be said in favor of the proposition that the mere act of sequestration gave the American company the right to charge off and treat as a completed, realized loss the then entire value of the German property, without regard to the fact that it had a substantial expectation and claim of recovery.”

(Brief, pp. 18, 19.)

The test of the right to treat a given transaction as a loss, and the test of what is a loss, must be made upon the state of facts existing when the loss occurs. If *at that time* there is nothing which could be done to save the property, or the right from loss, or to recoup for the loss, then loss occurs.

It cannot be said, it is submitted, that because subsequently the loss is made good under conditions or out of circumstances which could not have been reasonably anticipated no loss occurred when the claim for it was made.

There is substantially no denial, nor could there be, of the fact that owing to the sequestration by the German Government of the respondent's property that it lost that property, and no one could, in March, 1918, have anticipated that it would ever be possible to obtain any recovery in whole or in part of the loss. Such hope would have been based in the first instance upon the expectation of the United States and the Allies winning the war, which hope, in March, 1918, seemed almost beyond possibility.

The plan of reparations under which the claim was made for the loss was not set up until some time after

the conclusion of the war. The presentation of the claim by the respondent is only a step in the collection of the amount of its loss, the payment of the award to it being dependent upon appropriations for that purpose, which have not been made. The loss which the respondent suffered in 1918 is today as much a loss as it was then. If in the course of time the claim allowed by the Mixed Claims Commission should be paid, it will, under the provisions of the Revenue Act, become income taxable to the respondent in the year in which the payment was made, but until that happens the loss continues.

Conclusion.

Respondent respectfully submits that no error of law was made by the court below. It is respectfully requested that on the findings and opinion of the court below, and the reasons set forth in this brief, the judgment of the Court of Claims be affirmed.

Very respectfully,

JOHN HAMPTON BARNES,
JOHN F. McCARRON,
Attorneys for Respondent.